Kentucky Law Journal

Volume 77 | Issue 4 Article 2

1989

A Tribute and Challenge to Exceptional Law Students

Pierce Lively

United States Court of Appeals for the Sixth Circuit

Speech

A Tribute and Challenge to Exceptional Law Students*

BY PIERCE LIVELY**

Law journal work is demanding, preempting a large number of the free hours remaining after class preparation time, class time itself, and other requirements such as moot court, research papers, and similar projects that fill a law student's days. Although immediate recognition and possible future rewards provide a major incentive for participating in such a time-consuming extracurricular activity, a student's willingness to do so indicates a level of interest in law as a life's work that many other law students never develop.

To those who see law only as a way to make a living, much of the work of a journal's staff appears to be nothing but drudgery. These people cannot imagine the tremendous satisfaction that comes from acquiring a deeper understanding of the forces that have molded the rule of law into a key element in the social fabric of Western Civilization. By pursuing legal scholarship beyond the minimum requirements for a law degree while a student, one begins a process that, if continued after graduation, can add a dimension to a lifetime in the profession that many fellow students will never experience. Consequently, my message to students is to keep it up—one should always set aside some time for studying the history and development of law, exploring new frontiers in law, and understanding the proper role of law in human affairs. Students, their future clients or

---

* Speech to members of the *Kentucky Law Journal*, University of Kentucky, March 22, 1989.

** Senior Judge, Former Chief Judge, U.S. Court of Appeals for the 6th Circuit; A.B., Centre College, 1943; L.L.B., University of Virginia, 1948.

students, and their colleagues will benefit from this willingness to invest extra time and effort.

There are several questions that I like to put to second- and third-year law students: Do you remember why you chose to go to law school? If you do remember, do those reasons seem valid after experiencing law school? After this exposure, are you comfortable with law as a career? Having come this far, where do you go from here? In answering these questions, law students should strive to align their professional goals with their conceptions of the legal profession's role in society. In light of these questions and the suggested approach to answering them, I want to focus on two issues of current concern among lawyers and judges. Both will be around for awhile and, as future leaders of the bar, it is almost certain that today's top students will be required to deal with them.

I. NEGLECT OF FUNDAMENTAL PRINCIPLES AND THE DEVELOPMENT OF CORE LEGAL ABILITIES

It is distressing to hear a law student or lawyer disclaim any interest in the art of advocacy or the development of forensic skills because he or she either does not plan to engage in litigation or is not now a litigator. To me, the art of advocacy is foremost among a lawyer's skills. Advocacy skills are used in almost every professional contact, not just in the courtroom. They facilitate explaining to a client the legal dimensions of a problem or opportunity. Beyond that, in all negotiations on behalf of clients, advocacy skills enable a lawyer to present the client's position and bring persuasion to bear that can result in having that position accepted by parties with competing interests.

Advocacy is much more than the ability to sway a jury or judge with florid rhetoric. It is a method of communicating based on an approach to problems and issues from positions anchored in a clear understanding of legal fundamentals. My emphasis is on a clear understanding of fundamentals.

Many lawyers of my generation are distressed by the proliferation of courses offered by American law schools to the detriment of core legal subjects. A student learns to think and reason as a lawyer by studying conflicts between two or more individuals and conflicts between individuals and government,

and by learning how the law resolves such conflicts. From the study of torts, contracts, property, domestic relations, equity, constitutional law, and criminal law, the student begins to recognize and apply certain basic principles that undergird the entire body of American law. As the law has evolved to meet the challenge of new social, political, and economic developments in the nation and the world, these underlying principles have provided a foundation of consistency and predictability.

Obviously, there has been a justified demand to expand law school course offerings beyond the core curriculum. However, it sometimes appears that many of the recent curriculum additions are presented as if they deal with newly discovered legal principles rather than as recently developed areas of concern requiring the application of settled legal principles. Thus, I believe law schools should endeavor, particularly in the first two years of study, to present substantive law courses in a context that strongly emphasizes legal history and the development of legal thought. This emphasis can be made most effectively in connection with the study of core curriculum subjects. By contrast, many expanded curriculum subjects deal with statutes and administrative regulations. Such courses probably should be restricted to the third year, after students have had an opportunity to absorb and apply basic principles in traditional settings. It is difficult to think in broader terms when required to search for understanding in the arcane language and convoluted construction employed by the drafters of statutes and regulations.

While the tendency to stray from reliance on core legal abilities begins in law school, it does not disappear upon admission to the bar. The age of specialization has produced thousands of lawyers who concentrate so single-mindedly on narrow areas of law that they appear at times to have completely lost their moorings to our common law system. I am not impressed by lawyers who boast that they know only one field of law, but know everything there is to know about that field. I have yet to encounter a person who knows everything about anything. But, more importantly, I have yet to encounter any area of law so self-contained and particularized that it can be understood and applied in total isolation from those basic legal principles that have developed over the centuries.

Lawyers too intent on narrowly concentrated issues often stumble in court. All too often an appellate judge will ask an attorney during argument some question of the general tenor—"How did this case get here?" An appropriate response is not the name of the "gopher" or paralegal who carried the record to the courthouse. The judge wishes to learn how the case was presented to the trial court and, beyond that court's decision, the legal principles on which that decision was based. A question that a good second year law student would understand often throws an experienced but specialized lawyer into panic. Such a scenario just should not happen, and I blame the frequency with which it does occur on the neglect of fundamentals and the resultant failure to develop core legal abilities.

II. DECLINE OF PROFESSIONALISM

Lawyers have always had a perception problem. As the Japanese say: "Engineers make the pie grow larger; lawyers only decide how to carve it up." Lawyers are perceived as nonproductive elements of society, prospering from their neighbors' problems and society's ills. Of course, the legal community understands that this is an inaccurate picture. Lawyers know that they are guardians of the rule of law and that most of their number accept the responsibilities and obligations that go with the privileges. Sir Francis Bacon expressed this concept so well:

> I hold every man a debtor to his profession; from that which as men of course do seek to receive countenance and profit, so ought they to endeavor themselves, by way of amends, to be a help and ornament thereunto.

Yet, why do polls today show that the public puts lawyers near the bottom of most-admired occupations, grouping us with used car salesmen and members of Congress? Of course, some answers come quickly to mind: (1) The disgusting sight of American lawyers flying to India immediately after the Bhopal disaster, briefcases in hand, to sign up victims and their families as clients; and (2) The revelation that lawyers help the Wall Street gunslingers bend and break securities laws for great profits at the public's expense. Plainly, the legal profession becomes tarnished by these and similar occurrences depicting lawyers as

self-serving and selfish people who care only for money and will do anything to acquire it.

Unless ethics committees rein them in, these overly-aggressive, publicity-seeking lawyers will always be an embarrassment. The public must be made to realize that they are a minority and are not representative of the profession as a whole. However, there is another disturbing condition that appears to be endemic in the profession, and it is one all lawyers can do something about. I refer to the apparent decline in courtesy, candor, and cooperation among lawyers and a similar decline in recognition of the lawyer's responsibility as an officer of the court.

One member of an ethical profession should be able to rely on representations or promises of another member. By cooperating with each other, lawyers ease the burden of their clients, spare the courts the need to make unnecessary decisions, and reduce the cost of litigation. A persistent complaint of jurors concerns the unpleasant atmosphere of the courtroom, caused by lawyers snarling at each other, making absurd objections, and badgering witnesses. In going through court files, it is not uncommon to find correspondence and briefs in which lawyers level ad hominem attacks at one another. Such tactics add to already serious delays and to the enormous expense of litigation that the public finds unacceptable. This situation has gotten so bad that the American College of Trial Lawyers has revised its "Code of Trial Conduct" with a renewed emphasis on the need for civility, courtesy, and mutual respect.

A group of lawyers in Kentucky has proposed a code of conduct for all lawyers that features these practices of civility and common courtesy. One immediately cynical response came from a trial lawyer who sarcastically stated: "I suppose I should go over to my opponent each morning during a trial and ask, 'How are the wife and kids?'" My response would be, "That is not a bad idea." Lawyers who concentrate so totally on the adversarial nature of their work that they abandon all norms of dealing with others in a civilized society do the profession a great disservice.

Our new President says we are living in a "kinder, gentler America." I hope top law students, in their forthcoming legal careers, will do their part to make this claim come true by practicing civility in their dealings with fellow attorneys.

A related concern is the maintenance of high professional standards in dealing with the courts. Because of the tremendous increase in frivolous lawsuits, and in the failure of lawyers to heed the requirements of rules of practice and procedure, courts have begun imposing sanctions in numbers and amounts unimaginable a few years ago. Recently Federal Rule of Civil Procedure 11 was amended to make it clear that a lawyer has an obligation to investigate not only the facts, but existing law as well, before filing any pleading or motion. Failure to make such an investigation sometimes results in a claim or defense that cannot be supported, exposing both the attorney and the client to sanctions that can be severe. A prominent lawyer in another state was recently required to pay more than $200,000 as a sanction for inadequate case preparation. The lawyer filed a lawsuit and began discovery immediately. After hundreds of hours of lawyer time had been expended and several hearings held on objections to the lawyer's methods and to the extent of discovery, the defendants obtained a hearing on their motion to dismiss, and convinced the judge that the claim had no merit. The judge concluded that reasonable investigation in advance would have revealed the defect in the case. Thus, a heavy sanction was imposed.

The decline of professionalism will lead to the decline of the profession. Great public dissatisfaction with the adversary system has caused many scholars and concerned citizens to look closely at alternate methods of dispute resolution. Properly practiced, the adversary system serves a complex society quite well. However, society will not tolerate the system if it becomes a roadblock and hindrance rather than justifying its continuance as an expeditor of commerce and a reasonable method of solving individual and societal controversies.

CONCLUSION

Law journal members are the bright and dedicated lawyers of the future. Students who are willing to devote hours and days (that could be spent in pursuit of entertainment) to searching for a deeper understanding of law and the legal system, can serve this profession by the same sort of dedicated attention to these problems after they become members of the bar. Without

such dedication by the best, even an ancient and honorable profession can be discarded or replaced by a society that rightfully expects more than it feels it is now getting from a privileged group.

There is a personal reward for law journal members as well. The habit of inquiry one developes as a serious law student should, if nourished and continued, enable one to find satisfaction and adventure in a lifetime devoted to legal work and to prevent the excitement that accompanied that first discovery of law's fascinating possibilities from, as Wordsworth wrote, fading into the light of common day.